Supreme Court, U.S.
FILED

No. D

961460 MAR 1 1 1997
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1996

WJM REALTY, INC.,

Petitioner,

v.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

James S. Bubar*
***Counsel of Record**
James F. Bromley
1050 17th Street, NW
Suite 830
Washington, DC 20036
(202) 223-2060

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

38 pp

QUESTIONS PRESENTED FOR REVIEW

What should be the test for whether a taking is beyond the scope of the project under United States v. Miller, 317 U.S. 369 (1943), thereby entitling Petitioner to enhanced compensation under the Takings Clause of the Fifth Amendment or actual damages for violation of the Due Process Clause of the Fourteenth Amendment.

Whether, in this case, as a matter of law, the taking exceeds the scope of the project under United States v. Miller because the State Roads Commission did not have the requisite statutory authority to condemn Petitioner's land for an enormous storm water drainage facility unrelated to a highway project and principally benefiting another private landowner.

PARTIES TO PROCEEDINGS BELOW

The parties to this action in the Maryland Court of Special Appeals and the Maryland Court of Appeals were WJM Realty, Inc. and the State Roads Commission of the State Highway Administration. Additional parties before the Circuit Court of Montgomery County were Grant S. Heston and Jean Dulin Heston, Trustees, Lawrence A. Shulman and David A. Pordy, Trustees, the Washington Suburban Sanitary Commission, and Montgomery County, Maryland.

Pursuant to Supreme Court Rule 29.6, Petitioner discloses that WJM Realty, Inc. is a wholly-owned subsidiary of William J. Miller Realty, Inc. which is owned entirely by William J. Miller.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

PARTIES TO PROCEEDINGS BELOW..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... v

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE PETITION..... 10

I. THE TEST FOR WHETHER A TAKING IS BEYOND THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER THEREBY ENTITLING PETITIONER TO ENHANCED COMPENSATION UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT OR ACTUAL DAMAGES FOR VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT MUST BE REVISITED.....10

II. IN THIS CASE, THE TAKING OF PETITIONER'S PROPERTY BY THE STATE ROADS COMMISSION EXCEEDS, AS A MATTER OF LAW, THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER BECAUSE THE STATE ROADS COMMISSION DID NOT HAVE THE REQUISITE STATUTORY AUTHORITY TO CONDEMN PETITIONER'S LAND FOR AN ENORMOUS STORM WATER DRAINAGE FACILITY UNRELATED TO A HIGHWAY PROJECT AND PRINCIPALLY BENEFITING ANOTHER PRIVATE LANDOWNER..... 19

III. BECAUSE THE TAKING IS BEYOND THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER, PETITIONER IS ENTITLED TO ENHANCED COMPENSATION UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT OR ACTUAL DAMAGES FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT..... 28

CONCLUSION..... 29

APPENDIX..... App.

TABLE OF AUTHORITIES

Page

CASES

Baylin v. State Roads Commission, 300 Md. 1, 475 A.2d 1155 (1984)..... 9,13,16

Cincinnati v. Vester, 281 U.S. 439 (1930)..... 20,25

Davis v. Board of Education of Anne Arundel Co., 166 Md. 118, 170 A. 590 (1933)..... 24

Dolan v. City of Tigard, 512 U.S. - , 129 L.Ed.2d 304 (1994)..... 28

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)..... 21

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 8

King v. State Roads Commission, 298 Md. 80, 467 A.2d 1032 (1983)..... 23

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905)..... 21

Mayor & City Council of Baltimore v. Chertkoe, 293 Md. 32, 441 A.2d 1044 (1982)..... 21

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)... 29

Preseault v. ICC, 494 U.S. 1 (1990)..... 8

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)..... 21

United States v. Crance, 341 F.2d 161 (8th Cir. 1965)..... 14,15,16

United States v. Eastman, 528F.Supp. 1177 (D.Or. 1981) 13

United States v. Miller, 317 U.S. 369 (1943)..... passim

United States v. Reynolds, 397 U.S. 14 (1970)..... 11,12

United States v. 31.43 Acres of Land, 547 F.2d 479 (9th Cir. 1976)..... 12

United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979)..... 11,12

United States v. 49.01 Acres of Land, 669 F.2d 1364 (10th Cir. 1982)..... 13

United States v. 62.17 Acres of Land, 538 F.2d 670 [Jasper County]..... 14

United States v. 172.80 Acres of Land, 350 F.2d 957 (3rd. Cir. 1965) [Mercer County]..... 13,15

Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985)..... 29

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment V..... passim

U.S. Constitution Amendment XIV..... passim

Maryland Constitution Article III, § 40A..... 25

Maryland Constitution Article III, § 40B..... 3,9,24

STATUTES

28 U.S.C. § 1257..... 3

42 U.S.C. § 1983..... 8

Maryland Code Annotated, Transportation Article, §§ 8-101, et seq..... 3,9,25

Maryland Code Annotated, Real Property Article § 12-105..... 8

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

WJM REALTY, INC.,

Petitioner,

v.

STATE ROADS COMMISSION OF THE
STATE HIGHWAY ADMINISTRATION,

Respondent.

On Petition For Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

WJM Realty, Inc. ("Petitioner") respectfully petitions for a writ of certiorari.

OPINIONS BELOW

The judgment of the Honorable James S. McAuliffe, Jr., Specially Assigned Judge of the Circuit Court for

Montgomery County, Maryland dated August 29, 1995 in State Roads Commission of the State Highway Administration v. WJM Realty, Inc., et al., Civil No. 93,313 ("Memorandum Opinion and Order") and relevant portions of the transcript of the hearings referenced in the judgment (Appendix C) appear at App.84. [1]

The opinion of the Maryland Court of Special Appeals in State Roads Commission of the State Highway Administration v. W.J.M. Realty, Inc., et al., No. 1620, September Term, 1995, August 9, 1996 (unreported) ("Per Curiam Opinion") (Appendix B) reversing and remanding Judge McAuliffe's judgment appears at App.2.

The order of the Maryland Court of Appeals in WJM Realty, Inc. et al. v. State Roads Commission of the State Highway Administration, No. 444, September Term, 1996, December 11, 1996 ("Order") (Appendix A) denying certiorari appears at App.1 and is reported at 344 Md. 119, 685 A.2d 453 (1996).

JURISDICTION

The order of the Maryland Court of Appeals was entered on December 11, 1996 (App.1). The jurisdiction of

---

[1] Page numbers refer to pages in the Appendix.

this Court is founded upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments of the United States Constitution including due process, taking, and just compensation. This case also involves the Quick Take provision under Maryland Constitution Article III, § 40B, and the general power to acquire private property under Maryland Code Annotated, Transportation Article, §§ 8-101, et seq. Relevant constitutional and statutory provisions appear as Appendix D (App.114).

STATEMENT OF THE CASE

Montgomery County (the "County") obtained the assistance of the State Roads Commission of the State Highway Administration to improve Maryland Route 108, the intersection of Maryland Routes 108 and 124, and a stub extension of Route 124, adjacent to Petitioner's property in Damascus, Maryland.

The highway project dates back to May 1971, when the County amended its Master Plan to show the proposed highways in Damascus. Land records and other documents

from the 1960's also reference the proposed highways. When Petitioner acquired its parcel in 1978, it obtained a perpetual right of way and easement for unlimited access for vehicular and pedestrian traffic from its land to the new highway. In 1987, funds were allocated for the project through an amendment to a memorandum of understanding with the County. In 1988, during a public hearing, the State presented its preliminary plans and drawings to extend Route 124 some 500 feet. In 1990, the State presented its final plans for the Route 124 extension.

The State Roads Commission acquired rights to both the first 600 feet and the second 500 feet sections from an adjoining land owner (the Shoeb family) in return for access to the highway, pursuant to a right of entry agreement between the land owners and the County dated February 15, 1991. Although Petitioner has an easement over the land acquired for this purpose, the State Roads Commission ignored the easement.

Meanwhile, property owners in Damascus had a problem with drainage control (App.93). By far the largest property owner affected was Cynwyd, which owned a shopping center located across the proposed highway from Petitioner's property. The Master Plan in which the highways were referenced did not provide for regional storm water

management. The storm water facility originally to be constructed for highway storm water management was significantly smaller than the facility that was ultimately built. The original facility was to be constructed on Cynwyd property, and replace an existing sediment pond.

Later, in 1987, Cynwyd prepared plans for an off-site storm water facility on Petitioner's property. Robert C. Merryman, Chief of Transportation Engineering for the County, called it a regional facility (App.95). The County was interested in participating in the facility to provide retention serving a larger area. After considering the County's proposal, Petitioner refused to allow its site to be used (App.104).

In 1989, the County proposed to the State Roads Commission that Cynwyd's land not be taken, but that Petitioner's site be acquired over Petitioner's objection "to provide retention serving a larger area" including Cynwyd's shopping center. (Memorandum Opinion and Order, App.85.)

On July 16, 1992, the State Roads Commission commenced an action in the Circuit Court of Montgomery County to condemn 1.074 acres of Petitioner's land in fee simple and another 0.036 acre of Petitioner's land for revertible easements for supporting slopes. The land is part of a larger parcel of land that Petitioner owns in Damascus.

Although the stated purpose for the condemnation was for the construction of Maryland Routes 108 and 124, the State Roads Commission took Petitioner's land for a storm water facility. Prior to commencing the action, the State Roads Commission deposited a check with the Clerk of the Circuit Court in the amount of $8,950 (later reduced to $8,650) under the Quick Take provisions of the Maryland Code as the alleged fair market value of the land and improvements taken and for damages, if any, done to the property. Construction began around 1992.

In a bench ruling on March 14, 1995, the Circuit Court held that the storm water facility was not for the purpose of the State Roads Commission's highway construction project, which, as stated in the Condemnation Petition, was the widening of a segment of Route 108. The Circuit Court ruled:

> The so-called storm water drainage project is at the very least a separate project totally and completely from the state project. The **overwhelming evidence** is that whatever interest it served for the state were incidental to the greater interest being served ...

(App.99.) (Emphasis added.)

The Circuit Court then opined that the State Roads Commission's Quick Take powers were being illegally used

to acquire Petitioner's land for the County to benefit the County and the private owner of the shopping center, because neither the shopping center owner nor the County was able to acquire Petitioner's land contractually to solve the shopping center's storm water problem. Addressing the State Roads Commission, Judge McAuliffe said: "If there is a right of condemnation for a storm water facility to serve a regional need, that power does not lie with you [the State Roads Commission]."

On August 29, 1995, prior to trial, Judge McAuliffe dismissed the condemnation proceeding based on Petitioner's motion dated November 16, 1994. The Circuit Court found that the State Roads Commission sought to condemn Petitioner's land to serve the developmental purposes of another private owner (i.e. Cynwyd), and held that this action was an impermissible use of the public power of eminent domain. The Circuit Court found that the taking for regional storm drainage was beyond the State Roads Commission's authority. (Memorandum Opinion and Order, App.84.)

The Circuit Court ruled on the State Road Commission's motion in limine, finding that the storm water facility was outside the scope of the public highway project, and allowing the Petitioner to present evidence that the value of the property should be enhanced by the anticipated effect

of the highway project (App.101). Maryland Code Annotated, Real Property Article § 12-105. [2] [3]

The Circuit Court held that the condemnation was not constitutionally or statutorily authorized and that the State Road Commission was without authority to condemn the property. The Judge found that the land taking (Quick Take) for a regional storm drainage was beyond State Road Commission's authority because the State Roads Commission "seeks to condemn land of one private owner to serve developmental purposes of another private owner." (Memorandum Opinion and Order, App.84.)

The State Roads Commission appealed the judgment dismissing its condemnation complaint to the Maryland Court of Special Appeals. On August 9, 1996 the Court of Special Appeals reversed and remanded the case to the Circuit Court

---

[2] The Circuit Court also dismissed Petitioner's third party complaint against Montgomery County for inverse condemnation, conspiracy and violation of civil rights under 42 U.S.C. § 1983, ruling as a procedural matter that the third party claim was not appropriate in a condemnation case (App.92-93).

[3] The Circuit Court also ordered the State Roads Commission to amend its condemnation petition to address Petitioner's easement that was taken by the highway. "[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation." Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (cited in Preseault v. ICC, 494 U.S. 1, 24 (1990) (concurring opinion)).

for further proceedings. The Appeals Court concluded that the State Roads Commission legally used its Quick Take powers to condemn Petitioner's property as related to "any highway purpose" under Article III, § 40B of the Maryland Constitution and Title 8 of the Transportation Article. (Per Curiam Opinion, App.4,53.) The Appeals Court found that State Roads Commission was acting in accordance with the requirements of the U.S. Constitution because the Quick Take of land for the storm water facility was for a "public use." (Per Curiam Opinion, App.53.) The Appeals Court declined to find that the primary purpose of the storm water facility was to benefit Cynwyd or other private landowners. (Per Curiam Opinion, App.63.)

Further, the Appeals Court found that the Circuit Court's factual findings were clearly erroneous with respect to whether the storm water facility was within the scope of the highway project for purposes of valuation. (Per Curiam Opinion, App.3,79-83.)

The Appeals Court ordered the Circuit Court on remand to determine, based on Baylin v. State Roads Commission, 300 Md. 1, 475 A.2d 1155 (1984), the date upon which "landowners and prospective purchasers no longer could reasonably anticipate being able to devote [their] properties to their highest and best use in the context of the

surrounding governmental project." (Per Curiam Opinion, App.3,79-83). The Appeals Court opined that the commitment date may have been in 1987, when the funds were allocated for the project through amendment to the memorandum of understanding, or in 1988, when the State presented its preliminary plans and drawings to extend Route 124 some 500 feet during the public hearing, or in 1990, when the State presented its final plans of the Route 124 extension. Id. It found that the Circuit Court erred in holding that the date of commitment was in May 1971, when the County amended its Master Plan, which, it said, was advisory in nature. (Per Curiam Opinion, App.79-80.)

Petitioner sought a writ of certiorari from the Maryland Court of Appeals. On December 11, 1996 that Court denied Petitioner's petition finding that "there has been no showing that review by certiorari is desirable and in the public interest." (Order, App.1.)

REASONS FOR GRANTING THE PETITION

I.

THE TEST FOR WHETHER A TAKING IS BEYOND THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER THEREBY ENTITLING

PETITIONER TO ENHANCED COMPENSATION UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT OR ACTUAL DAMAGES FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MUST BE REVISITED

Under very similar facts, including the facts of this case, different courts have reached different conclusions as to whether condemned property was beyond the scope of the government project. Courts have acted in this area not as triers of fact, but ruling on the law, subject to de novo review on appeal. More exact guidance in this area is critical.

The scope of the project rule, formulated by the Court in United States v. Miller, is easy to state: If the property being condemned was "probably within the scope of the governmental project from the time the government was committed to it," the landowner is not entitled to compensation for any increase in value caused by the project. United States v. Miller, 317 U.S. 369, 376-77 (1943). The rule, however, is not easy to apply. United States v. 320.0 Acres of Land, 605 F.2d 762, 782 (5th Cir. 1979). Consequently, the Court clarified the scope of the project rule in United States v. Reynolds, 397 U.S. 14 (1970). Although dicta, the Court restated the Miller rule and noted the

following:

> As with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment. The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.

Reynolds, 397 U.S. at 21 (footnote omitted.) The question of whether the taking of land in issue was within the scope of the original project is a legal question to be decided by the trial court. Reynolds, at 20 n. 14.

Other courts have refined the scope of the project rule to reflect the reasonable expectations of landowners and prospective purchasers as to whether a piece of property will be taken. See e.g., United States v. 320.0 Acres of Land, 605 F.2d 762, 793 (5th Cir. 1979) (noting that the "crucial inquiry" is whether a landowner or a private purchaser could reasonably anticipate that he could devote the property to its highest and best economic use without serious fear that the government would soon condemn the land); United States v. 31.43 Acres of Land, 547 F.2d 479, 481-82 (9th Cir. 1976) (affirming the trial court's finding that property was within the

scope of the project where no public information existed that might have led a property owner to believe that his land would not be a probable object of condemnation); United States v. 172.80 Acres of Land, 350 F.2d 957, 959 (3rd Cir. 1965) [Mercer County] (holding that a landowner was entitled to the enhanced value of his property because a purchaser contemplating acquisition and development of the property could reasonably have anticipated that, at the time the government committed to the project, he would be able to devote that land to its highest economic use without serious apprehension of condemnation); United States v. 49.01 Acres of Land, 669 F.2d 1364, 1367 (10th Cir. 1982) (holding that the scope of the project rule, as enunciated by Miller and Reynolds, requires the government to pay the enhanced value of the land if "the landowner reasonably believed that subsequent government action removed the property from the project's scope"); United States v. Eastman, 528 F.Supp. 1177, 1182 (D.Or. 1981) (holding that the Fifth Circuit's reasonable-expectations test requires that the enhanced value be an element of a landowner's condemnation award).

The Maryland Court of Appeals adopted Miller in Baylin v. State Roads Commission, 475 A.2d at 1161. The Maryland Court went on consider the following three factors to determine if a taking was reasonably foreseeable: (a) The

foreseeability that the original proposed dimensions of the project might have to be changed to include the condemned property, (b) the length of time between commencement of the project and condemnation of the property, and (c) government representations concerning the finality of the project as originally announced. Baylin, 475 A.2d at 1162-63.

Even as refined to reflect the reasonable expectations of the landowners, however, the application of the scope of the project rule leads to different results on similar facts. The following decisions, including the instant case provide examples of such inconsistency:

In United States v. 62.17 Acres of Land, 538 F.2d 670 [Jasper County] the government did not specify the landowner's property in the original plans. Nevertheless, the government's representations that it would take all of the property within the five year flood line and the probability of mistakes in surveying made it reasonably foreseeable that the government would take the landowner's property. Jasper County, 538 F.2d at 681. In United States v. Crance, 341 F.2d 161 (8th Cir. 1965) the district court held that the property was not within the scope of the project, finding that the government decided to take the remaining 35 acres of the landowner's tract to create public recreation facilities after it

purchased five acres from the same landowner for a dam and reservoir project. Crance, 341 F.2d at 162-63. Although from its inception, the project called for recreational facilities around the reservoir, neither a preliminary design memorandum nor a public proposal of sites approved the Chief of Engineers included taking any of the remainder of the landowner's tract. Thus, the district court allowed evidence concerning the enhanced value of the property. Crance, 341 F.2d at 162. On appeal, the Eighth Circuit reversed, noting that none of the plans that excluded the landowner's additional property was a final plan and finding significant that "the project contemplated recreational areas from its very inception." Crance, 341 F.2d at 165.

In Mercer County, the government purchased 20 acres of a landowner's 100 acre tract for a dam and reservoir project. During negotiations, the government representative assured the landowner that the government would not need other parts of his land for the project. Although the original project did not call for the creation of recreational areas, a change in the government's policy concerning public developments and the use of reservoir areas prompted a decision to acquire the remainder of the landowner's property for recreational use. The Third Circuit affirmed the holding of the district court that the enhanced value of the property

should be included in the condemnation award. Mercer County, 350 F.2d at 959. The Third Circuit distinguished Mercer County from Crance based on the differences between the government's representations and the original plans of the projects.

In Baylin, the Maryland trial court excluded any evidence of enhancement for a mass transit facility that was constructed after an expressway, finding that they were part of the same project. The Maryland Court of Appeals, on the other hand, found that the construction of the two projects was in fact two separate projects for the purpose of determining just compensation. Baylin, 475 A. 2d at 1158.

In the instant case, the highway project dates back to May 1971, when the County amended its Master Plan to show the proposed highway. Land records and other documents from the 1960's also reference the proposed highways. When Petitioner acquired his parcel in 1978, he obtained a perpetual right of way and easement for unlimited access for vehicular and pedestrian traffic from his land to the new highway. In 1987, funds were allocated for the project through amendment to a memorandum of understanding with the County. In 1988, during a public hearing, the State presented its preliminary plans and drawings to extend Route 124 some 500 feet. In 1990, the State presented its final

plans for the Route 124 extension. The State Roads Commission acquired rights to land for the highway from an adjoining land owner (the Shoeb family) in return for access to the highway in February 1991.

At some point, the County decided to construct a storm water facility and persuaded the State Roads Commission to use its Quick Take condemnation powers to acquire the land. The storm water facility originally to be constructed for highway storm water management was significantly smaller than the facility that was ultimately built, and it was to be constructed on Cynwyd property. Later, in 1987, Cynwyd prepared plans for an off-site storm water facility on Petitioner's parcel. Robert C. Merryman, Chief of Transportation Engineering for the County, called it a regional facility (App.95). The County was interested in participating in the facility to provide retention serving a larger area. However, after considering the County's proposal, Petitioner refused to allow its site to be used (App.104). In 1989, the County proposed to the State Roads Commission that Cynwyd's land not be taken, but that Petitioner's site be acquired over Petitioner's objection "to provide retention serving a larger area" including Cynwyd's shopping center. Memorandum Opinion and Order, 8/29/95, p. 2.

Judge McAuliffe ruled, as a matter of law, that the highway project and the storm water facility were two separate projects. He found that the storm water facility was not mentioned in the earlier plans for the highway or in the land records of the landowners adjoining the highway. Moreover, he found that the storm water facility actually built was more excessive than originally planned and was unneeded for the highway. He concluded that it was built as a regional facility unrelated to the highway and for the benefit of another private landowner.

The Maryland Court of Special Appeals ruled that the scope of the project could only have been determined not earlier than 1987 when the funds were allocated for the project, and not in May 1971 when the County amended its Master Plan. (Per Curiam Opinion, App.82.) Master plans, it held, are advisory in nature, "[a]bstract, long range planning of the sort done in the master plan cannot qualify as the practical, detailed design necessary to constitute a commitment to a project under the scope of the project rule" (App.80). The highway project had been programmed for twenty years (App.101) and was reflected in the Master Plan, land records and other documents. Landowners and purchasers had been relying on the highway project well before there was any discussion of a regional storm water

facility. Yet, the Court of Appeals, when reviewing exactly the same evidence as the Circuit Court, reached a different result.

Consequently, as shown above, under very similar facts, including the facts of this case, different courts have reached different results, not as triers of fact, but as rulings on the law, subject to de novo review on appeal. Guidance in this area is critical.

II.

IN THIS CASE, THE TAKING OF PETITIONER'S PROPERTY BY THE STATE ROADS COMMISSION EXCEEDS, AS A MATTER OF LAW, THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER BECAUSE THE STATE ROADS COMMISSION DID NOT HAVE THE REQUISITE STATUTORY AUTHORITY TO CONDEMN PETITIONER'S LAND FOR AN ENORMOUS STORM WATER DRAINAGE FACILITY UNRELATED TO A HIGHWAY PROJECT AND PRINCIPALLY BENEFITING ANOTHER PRIVATE LANDOWNER

There is a two-step process for determining whether a taking is constitutionally permissible: (1) Whether it is for a public purpose, and (2) whether the taking is authorized by

statute.

In Cincinnati v. Vester, 281 U.S. 439 (1930) owners of land in the City of Cincinnati sought to restrain the appropriation of excess property by the City on the grounds that the taking was not in accordance with the applicable provisions of the constitution and statutes of Ohio and would constitute a deprivation of property without due process of law in violation of the Fourteenth Amendment. The Court considered whether the taking was for a public use and concluded that the municipality had failed to define the purpose of the appropriation as required by Ohio law. Although the question of what is a public use is a judicial one, the Court refrained from deciding that question in the absence of a municipal determination. The Court examined whether the municipality had complied with the Ohio statutes and ruled that it had not. "We understand it to be the rule in Ohio, as elsewhere that the power conferred upon a municipal corporation to take private property for public use must be strictly followed."

In the instant case, the scope of the project under United States v. Miller was exceeded as a matter of law because the taking was for a private purpose and because it was beyond the statutory authority of the State Roads Commission.

A. THE TAKING WAS FOR A PRIVATE PURPOSE

"Private property cannot be taken by the government, national or state, except for purposes which are of a public character ... any state enactment in violation of these principles is inconsistent with the due process law prescribed by the Fourteenth Amendment." Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). It is only necessary to show that the primary purpose was to benefit the private owners to find that the taking was impermissible. See Mayor & City Council of Baltimore v. Chertkoe, 293 Md. 32, 441 A.2d 1044, 1055 (1982).

In the instant case, Judge McAuliffe found that the taking of Petitioner's property for a storm water facility was for a private purpose and was impermissible under the public power of eminent domain. He stated:

> Plaintiff State Roads Commission of the State Highway Administration seeks to condemn land of one private owner to serve developmental purposes of another private owner. This is an impermissible use of the public power of eminent domain.

Memorandum Opinion, p.1 (App.84). In the hearing on this matter, Judge McAuliffe put it another way, stating:

> We aren't talking condemnation now, we are talking Constitutional right and damages for invading basic Constitutional protections and corrupting the process to use the power of imminent [sic] domain for a private purpose wholly wrong when that private entity could not get what they were seeking at the bargaining table. It was done. They got it.

(App.108-109.)

The Circuit Court relied on overwhelming evidence in support of its ruling (App.99). Nonetheless, the Appeals Court found, as a matter of law, that the storm water facility was for a public use and declined to find that the primary purpose of the storm water facility was to benefit Cynwyd or other private landowners. (Per Curiam Opinion, App.63.) In arriving at its conclusion, the Appeals Court reached well beyond the record to find a public purpose for the taking. The finding is not based upon any statements by State (or even County) officials prior to the taking as to the public necessity, but rather upon an arbitrary and expansive view by the Appeals Court of the need for an enormous regional storm water facility. The opinion ignores the stated purpose of the taking as recited in the Condemnation Petition, which was "the widening of a segment of Route 108." The Appeals Court's determination in the face of overwhelming evidence

cannot stand.

B. THE TAKING WAS BEYOND THE COMMISSION'S AUTHORITY

This case involves the use of Quick Take condemnation proceedings. In conventional condemnation cases, no right to possession of private property is obtained by the condemning authority until it pays the full amount of the condemnation judgment plus costs. King v. State Roads Commission, 298 Md. 80, 467 A.2d 1032 (1983). In Quick Take proceedings, property is taken immediately upon payment into Court of an estimate of the price with any further amounts to be paid to the landowner after judgment. In the present case, over four years have passed since the filing of the condemnation petition in July 1992, and Petitioner has neither received the return of its land nor the compensation to which it is entitled. Nor is Petitioner able in the presence of this facility, what Judge McAuliffe called "a major eyesore from a development standpoint," "a monstrosity as to size," to use the remainder of its property to its highest and best use (App.100).

The State is entitled to use Quick Take proceedings for only very limited purposes. Statutes and constitutional provisions conferring the power of eminent domain must be

strictly construed. Davis v. Board of Education of Anne Arundel Co., 166 Md. 118, 120, 170 A. 590 (1933). Here, the Circuit Court found that the "land taking (Quick Take) for regional storm drainage is beyond commission authority." (Memorandum Opinion, App.84.) The Appeals Court concluded that the taking was within the Commission's authority because it was related to "any highway purpose." (Per Curiam Opinion, App.3,52.) Based upon a statutory analysis, the Appeals Court reasoning must fail.

Quick Take powers of the State Roads Commission are set forth in Maryland Constitution Article III, §40B. They are limited to highway purposes. Section 40B states:

> The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that where such property in the judgment of the State Roads Commission is needed by the State **for highway purposes**, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, such amount as said State Roads Commission shall

> estimate to be of fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be awarded by a jury.

(App.115-116.) (Emphasis added.)

The Maryland Constitution does not authorize the taking of private property by the State Roads Commission for a purpose not related to highways. [4]

Relevant provisions of the Maryland statutes reinforce the constitutional limitation of the State Road Commission's exercise of its Quick Take powers to highway purposes only. Although Maryland Transportation Article § 8-302 allows condemnation by the State Roads Commission under the Quick Take provisions to acquire "any private property for any highway purpose" (App.118), the definitions in Maryland Transportation Article § 8-101 define "related storm water management facilities and structures" narrowly as "structures

---

[4] Although the County may also be authorized to Quick Take land for a right of way for County roads or streets, this power, too, is strictly limited to condemnations for roads and streets, not storm water management facilities. Maryland Constitution, Article III, § 40A (App.114-115). Moreover, there must be a finding by the County Council that there is an immediate need for the right of way for County roads or streets. Id. In this case, there has been no showing that the County has complied with its statutory responsibilities. See, Cincinnati v. Vester, 281 U.S. 439 (1930). In fact, Judge McAuliffe concluded the opposite.

forming an integral part of a street, road, or highway" and "property acquired for the construction, operation, or use of the highway." (App.116-117.)

Judge McAuliffe found that the storm water facility was too enormous to be incident to a highway purpose. Indeed, the testimony was that the facility was constructed as a regional facility principally to benefit the private neighboring land owner. Consequently, the Quick Take condemnation of Petitioner's land for the purpose of an unrelated storm water facility was beyond the limited constitutional and statutory authority of the State Roads Commission.

The State Roads Commission may not use its Quick Take authority for a regional storm water facility benefiting principally another private landowner simply because the County requested that the Commission exercise its power. Moreover, the power of one municipal authority to condemn property cannot be lent to another. As Judge McAuliffe stated:

> I remain of the view, based upon the evidence that we heard, that this project undertaken by the State so exceeded the State's authority to condemn for drainage required by its road project, and only that required by its road project, that the power was exceeded to such

> an extent that it cannot be said that it was appropriately used or legally used, and I conclude that the motion to dismiss on the grounds that it was not used for a purpose of public necessity within the purview of the State Highway Administration's authority to condemn -- it may have been -- within the authority of others, but the Highway Administration may not lend out its eminent domain powers to be exercised by others who have eminent domain powers -- This is not a power to be kicked around or to be traded back and forth. If you have the power, you exercise it. The State has the power in connection with roads, the State Highway Administration; this storm water drainage facility was a facility to serve much, much more than the roads themselves and was ultimately built, I am convinced, exactly as it was suggested in the footnote to the memorandum which appeared in the original record as defendant's number 5.

(App.112-113.)

Consequently, the taking of Petitioner's property by the State Roads Commission exceeded, as a matter of law, the scope of the project under United States v. Miller. The State Roads Commission did not have the requisite statutory

authority to condemn Petitioner's property for a storm water facility which was unrelated to a highway project.

III.

BECAUSE THE TAKING IS BEYOND THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER, PETITIONER IS ENTITLED TO ENHANCED COMPENSATION UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT OR ACTUAL DAMAGES FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Under United States v. Miller Petitioner should be entitled to the benefit of the highway in calculating the value of the property taken for the storm water facility. Petitioner should also be entitled to actual damages for violation of the Due Process Clause of the Fourteenth Amendment.

Chief Justice Rehnquist stated in Dolan v. City of Tigard, 512 U.S. - , 129 L.Ed.2d 304, 323 (1994):

> Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas ... The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be

> done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal [Co. v. Mahon], 260 U.S. [393,] at 416 [(1922)].

In condemning land in this case by using Quick Take powers, the County used the State Roads Commission to take a short-cut. The State Roads Commission had no authority to take land for a regional storm water facility. Petitioner should be entitled to the benefit of the highway in calculating the value of the property taken for the storm water facility. Petitioner should also be entitled to actual damages for violation of due process under the Fourteenth Amendment.

The remedy for a regulation that goes too far, under the due process theory is not just compensation, but invalidation of the regulation, and if authorized and appropriate, actual damages. Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 197 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 11, 1997.

Respectfully submitted,

JAMES S. BUBAR*
* Counsel of Record
JAMES F. BROMLEY
1050 17th Street, N.W.
Suite 830
Washington, D.C. 20036
(202) 223-2060

Counsel for Petitioner